No. 87-1521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DANIEL J. MAHONEY, JR.,
EXECUTOR OF THE ESTATE OF JAMES M. COX, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In this case, the Sixth Circuit: (1) reached out and decided an issue not decided by the district court, thereby departing from accepted judicial procedure; and (2) decided the issue in such a way as to amount to a holding that the bona fide sale exception in Section 2036(a) can never apply to an integrated transaction involving a gift, thereby conflicting in principle with the decisions of other circuits. This case raises substantial issues of judicial procedure and estate tax administration that should be addressed in this Court.[1]

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[1] To the extent the Government believes the "widow's election" cases are incorrectly decided and should be revisited, Opposition at

The Government argues that this Court should not decide the merits of an issue not presented to the Sixth Circuit, but fails to recognize that, under its own reasoning, it was error for the Sixth Circuit to decide an issue not presented to it and not decided by the district court.[2] As the Government admits, Opposition at 4, the only issue on appeal was whether Decedent had "made a transfer." Had the Sixth Circuit resolved only that issue, this petition would be unnecessary, but the Sixth Circuit went further and held that the value of the stock "must be included" in Decedent's gross estate. That holding on the broader issue of includibility arguably forecloses consideration of the statutory exception even though the district court did not decide the issue.

The Government incorrectly glosses over this procedural error by arguing that the Estate should have raised the statutory exception issue on appeal. This is wrong; indeed, it would have been improper for the Estate to have raised in the Sixth Circuit the applicability of the statutory exception. There was no factual finding by the district court as to whether Decedent received as much in

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10 & n.4, that is another reason this Court should grant the petition for a writ of certiorari. In any event, the Estate cited numerous cases that did not involve "widow's elections." *See, e.g., In re Estate of Davis,* 440 F.2d 896 (3d Cir. 1971); *United States v. Past,* 347 F.2d 7 (9th Cir. 1965); *Sullivan's Estate v. Commissioner,* 175 F.2d 657 (9th Cir. 1949); *Helvering v. United States Trust Co.,* 111 F.2d 576 (2d Cir.), *cert. denied,* 311 U.S. 678 (1940).

[2] The Government is clearly wrong in asserting that the Estate failed to explain to this Court the broad procedural issue presented in this case "that warrants the attention of this Court." Opposition at 7. The Estate plainly states that the Sixth Circuit, in reversing without remanding, "[decided] an issue not passed upon below," and the Estate specifically requests that this Court exercise its supervisory authority over an inferior federal court that has ". . . substantially depart[ed] from the accepted and usual course of judicial proceedings and the disposition of federal litigation." Petition at 12-13 (citations omitted).

the exchange with the Trust as he transferred, because the district court ruled that there was no "transfer" under Section 2036(a) in the first instance. District court consideration of the applicability of the statutory exception is necessary only as a result of the Sixth Circuit's decision that Decedent must be deemed to have made a "transfer" under Section 2036(a).[3]

The Government also errs in arguing that the statutory exception cannot apply to Decedent's "transfer" to the Trust. It contends that, although Decedent received property from the Trust as part of the transaction, the transfer *to* Decedent somehow was separate from the rest of the transaction and, in any event, was a gift, which the Government argues cannot constitute consideration in this case. This is wrong for two reasons.

First, it is inconsistent and improper to treat different parts of the integrated transaction as though each occurred in isolation. *See United States v. Estate of Grace*, 395 U.S. 316, 325 (1969); *Helvering v. Le Gierse*, 312 U.S. 531, 540 (1941). The Sixth Circuit considered the total economic effect of the integrated transaction to determine that Decedent must be considered to have made a "transfer" of 85 shares. It is not disputed that, as part of the overall transaction, Governor Cox required Decedent to make this "transfer" to the Trust. Therefore, the Sixth Circuit should have remanded the case for the district court to consider the total economic effect of the integrated transaction in light of the Sixth Circuit's ruling, to determine whether the transfer was an exchange for at least equivalent value (a life interest in 665 shares) under the statutory exception.

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[3] Contrary to the Government's implication, the Estate did follow proper procedure in light of the Sixth Circuit's decision. The proper procedure when a mandate might foreclose consideration of an unresolved issue is to move for modification of the mandate. *Riley v. MEBA Pension Trust*, 586 F.2d 968, 972 (2d Cir. 1978).

Second, the characterization of Governor Cox's transfer of 665 shares to the Trust as a gift is not dispositive of whether Decedent received in exchange for his 85 shares consideration of at least equivalent value. The Government broadly asserts, without citation of authority, as follows:

> A donative transfer is, by definition, the opposite of a bargained-for exchange; plainly, a gift cannot be part of "a bona fide sale for an adequate and full consideration" within the meaning of Section 2036(a).

Opposition at 10. This is incorrect. A "gift" under the gift tax laws does not necessarily entail donative intent, *Commissioner v. Wemyss*, 324 U.S. 303, 306 (1945), and the property may constitute "consideration" as part of an integrated transaction. *See Commissioner v. Bristol*, 121 F.2d 129, 133-34 (1st Cir. 1941).[4] A mutual promise

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[4] The Government misplaces reliance on *Giannini v. Commissioner*, 148 F.2d 285 (9th Cir.), *cert. denied*, 326 U.S. 730 (1945). In *Giannini*, the decedent's transaction with the trust involved an explicit statement attached to the trust agreement whereby the decedent expressly accepted his parents' gift to the trust. 148 F.2d at 286. In contrast, Decedent here paid consideration, executing a promissory note "in payment for 750 shares of stock." Petition Appendix at 12a. Now that the Sixth Circuit has determined that Decedent in substance paid consideration for 85 shares, which he was required to transfer to the Trust, the district court must determine whether Decedent received in exchange at least equivalent value as part of the integrated transaction.

The other cases cited by the Government also do not support its position. In each case, the decedent clearly had received less than adequate and full consideration for the property transferred. *See Mollenberg's Estate v. Commissioner*, 173 F.2d 698, 701 (2d Cir. 1949); *Phillips v. Gnichtel*, 27 F.2d 662, 664 (3d Cir. 1928); *Estate of Schwartz v. Commissioner*, 9 T.C. 229, 237-38 (1947). Indeed, these cases support the Estate's position that separate parts of an integrated transaction must not be viewed in isolation and that the characterization of one part of such a transaction as a gift is not dispositive of whether the decedent received at least equivalent value in the exchange. *See Mollenberg's Estate*, 173 F.2d at 701; *Estate of Schwartz*, 9 T.C. at 239.

may be consideration to support an agreement, even though a portion of one party's transfer is a gift under federal gift or estate tax laws. *See id.*[5] For purposes of the Internal Revenue Code, consideration is received if a party transfers property and it is replaced with property of at least equivalent value in money or money's worth. *See id.*[6]

For the reasons stated above, in the Petition, and in the Joint Brief of Amici Curiae, this Court should grant the Estate's Petition for a Writ of Certiorari.

Respectfully submitted,

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[5] The fact that the excess of what Decedent received (a life interest in 665 shares) over what he transferred (85 shares) may be a gift, *see Bristol*, at 133-34, is irrelevant to whether he actually received at least equivalent value in the exchange.

[6] As the Government recognizes, the purpose of this provision is to prevent depletion of an estate without payment of estate tax. Opposition at 9. Nonetheless, the Government wholly failed to address whether Decedent's estate actually was depleted as a result of the integrated transaction. This issue is one appropriately to be decided by the district court.